Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

IN RE CENTER FOR EXCELLENCE
IN HIGHER EDUCATION

2019-MISC-Center for Excellence in Higher Education-0001

DECISION AND ORDER ON PETITION BY CENTER FOR EXCELLENCE IN HIGHER EDUCATION TO SET ASIDE OR MODIFY THE APRIL 12, 2019, CIVIL INVESTIGATIVE DEMAND

On May 21, 2019, the Center for Excellence in Higher Education (CEHE) filed a Petition with the Bureau seeking to set aside or modify a civil investigative demand (CID) that the Bureau served on it on April 12, 2019, and that the Bureau modified by a letter dated May 1, 2019. For the reasons set forth below, I deny CEHE's Petition.

FACTUAL BACKGROUND

On April 12, 2019, the Bureau issued a CID to CEHE seeking information about whether it is extending credit to college students, and whether in connection with any such credit, it has misrepresented the nature of the credit it is offering, or has enrolled students in financing programs without their consent or knowledge. As explained in the CID's Notification of Purpose, the Bureau seeks:

> to determine (1) whether colleges or associated persons are offering to extend credit, extending credit, or providing financial-advisory services to students; (2) whether these persons, in connection with offering to extend credit, extending credit, or providing financial-advisory services, have misrepresented the true nature of a financing program or enrolled students in a financing program without their knowledge or consent in a manner that is deceptive, unfair, or abusive, in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; and (3) whether Bureau action to obtain legal or equitable relief would be in the public interest.

The CID seeks oral testimony regarding two topics:

1) CEHE's offering and provision of student loans, other forms of financial assistance, or tuition-payment plans to prospective students, including: a) policies, procedures, and practices related to student-loan marketing, underwriting, origination, servicing, or collection; b) CEHE's training, supervision, and performance management of its financial aid planners and any other personnel with job duties related to advising students about how to pay for college; c) CEHE's policies, procedures, and practices related to the servicing of its student loans and its sale of student debt to third parties; and d) CEHE's policies, procedures and practices related to its furnishing of student-borrower information to consumer-reporting agencies.

2) Any litigation in which CEHE has been a party since January 1, 2012, related to CEHE's student loans or other forms of financial assistance to prospective students.

The CID set the investigational hearing for May 21, 2019. The Bureau's rules require that CEHE meet with a Bureau investigator and confer regarding compliance. 12 C.F.R. § 1080.6(c). As a result of this process, on May 1, 2019, the Bureau issued a letter that modified the CID, changing the date for the investigational hearing to June 11, 2019, and limiting topic 1 so that CEHE was only required to provide responsive information from January 1, 2012, until the date of the CID. CEHE then filed its Petition to Set Aside or Modify the CID (Pet.), which was docketed on May 21, 2019.

LEGAL DETERMINATION

Although CEHE divides its argument into two parts, it actually presents three arguments. It contends that 1) compliance with the CID would be unduly burdensome; 2) the CID seeks information that is not relevant to any law enforcement action the Bureau might bring; and 3) the Bureau has an improper purpose for serving the CID on CEHE. I reject CEHE's first argument because it has failed to show that it would be unduly burdened by complying with the CID. I reject the second argument because it is based on a misunderstanding of the nature of the Bureau's investigation, which is focused on potential violations of the Consumer Financial Protection Act. I reject the third argument, which suggests that the Bureau is acting in bad faith, because CEHE has provided no credible basis for such a claim.

I. Burden

CEHE's burden argument has seven parts. It argues that: 1) the CID seeks testimony regarding every aspect of its student loan program and covers a seven-year period; 2) the Bureau's rules do not permit CEHE's witnesses to refuse to answer any question; 3) there is no time limit on the length of the Bureau's investigational hearing; 4) the Bureau's May 1, 2019, letter modifying the CID allowed CEHE too little time (40 days) to prepare its witnesses for the hearing; 5) if it fails to comply with the CID, CEHE faces civil contempt; 6) complying with CID topic 2 could require witnesses to testify regarding four causes of action; and 7) the CID forces CEHE to make a choice between withholding responsive information or violating its obligation under the Family Educational Rights and Privacy Act (FERPA), which requires

educational institutions to protect the confidentiality of educational records. None of these arguments justifies setting aside or modifying the CID.

The standard for judging burden in connection with an administrative agency's investigative compulsory process (such as a CID) is set forth in *FTC v. Texaco*:

> the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

555 F.2d 862, 882 (D.C. Cir. 1977) (emphasis in original). *See FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) (an administrative subpoena "is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business"); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999) (denying claim of undue burden where "Chevron offers no explanation ... why, relative to Chevron's size, the compliance cost and effort 'unduly disrupt or seriously hindered normal operations'"); *FTC v. Texaco*, 555 F.2d at 881-883 (enforcing CID against, among others, Standard Oil, even though it claimed compliance costs of $4 million).

CEHE has failed to show that it would be unduly burdened by complying with the CID. In none of its arguments does CEHE suggest that complying with the CID would in any way disrupt its operations. For that reason alone, I reject its claim of burden. Nor do any of its seven separate arguments demonstrate undue burden. It complains that the CID seeks testimony regarding every aspect of its student loan program and covers a seven-year period. Pet. at 6-7. It also complains that any witness or witnesses testifying in response to the CID's second topic might be required to testify regarding four causes of action. Pet. at 9. But CEHE never contends that it would be burdensome, or even difficult for a witness, or witnesses, to provide the information requested by the CID regarding either CEHE's policies and procedures or its litigation. A CID is not unduly burdensome merely because the target characterizes the requested information as "extensive." *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 970 (C.D. Cal. 2017) ("To show that an administrative subpoena imposes an undue burden, a subpoenaed party cannot merely point to an agency's 'extensive' requests or assert that compliance would be costly"), and cases cited therein.

CEHE argues that the Bureau's rules do not permit CEHE's witnesses to refuse to answer any question, and that if a witness fails to comply even innocently with any part of the CID, that witness that witness will face civil contempt. Pet. at 7. First, CEHE has misread the Bureau's rules regarding the rights of witnesses. Those rules specifically provide that witnesses may refuse to answer any questions that call for the disclosure of privileged information. 12 C.F.R. §§ 1080.8-.9. Further, with respect to innocent mistakes in a witness's testimony, the Bureau's

rules provide witnesses with an opportunity to review their testimony, to make changes, and to provide an explanation for those changes. 12 C.F.R. § 1080.9(a). Nor are Bureau CIDs self-enforcing. Thus, if a witness refuses to provide information that is not privileged, that witness can only face contempt if the Bureau first obtains a court order enforcing the CID, and that witness then violates the court order. Were that to occur, it would be the court, not the Bureau, that would have the authority to impose civil contempt. In any event, such highly speculative arguments – that a CEHE witness would refuse to provide information that was not privileged, or that such a witness would subject him- or herself to contempt of a final court order – provide no basis for setting aside or modifying a CID.

CEHE complains that there is no time limit on the length of the Bureau's investigational hearings, and that the CID did not allow it sufficient time to prepare its witnesses for the investigational hearing. Pet. at 7. There is no basis for CEHE's speculation that, during the course of an investigational hearing, the Bureau would somehow subject its witnesses to excessive questioning. Moreover, were that somehow to occur, CEHE could raise objection at that time. And although CEHE complains that it has only 40 days to prepare its witnesses, it is mistaken. As amended by the Bureau's letter of May 1, the hearing date was set for June 11. Moreover, as a result of its Petition, that date has been delayed even further. CEHE received the Bureau's subpoena on April 12, 2019. Thus, it will have had more than three full months to prepare its witnesses. CEHE has provided no explanation as to why it needs any more time than that to prepare its witnesses to respond to the CID.

Finally, CEHE contends that if it complies with the CID, it "will be forced" to violate the privacy protection provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA). Pet. at 9-11. FERPA protects the privacy of students and parents by limiting the authority of educational institutions to disclose personally identifiable information that is contained in a student's educational records. 34 C.F.R. § 99.30. Neither of the Topics for Hearing set forth in the CID requires CEHE to provide personally identifiable information from students' educational records. In particular, Topic 1 seeks testimony regarding CEHE's policies, procedures, and practices related to student-loan marketing, training, loan servicing, furnishing of information to consumer reporting agencies. There is nothing about this topic that would require CEHE to disclose personally identifiable information. Indeed, if it were necessary for CEHE to disclose information from students' records, it could comply with FERPA by disclosing this information in de-identified form. *See Ke v. Drexel University*, No. 11-cv-6708, 2015 WL 5316491, *20 n.18 (E.D. Pa. Sept. 4, 2015). Topic 2 seeks information regarding litigation as to which CEHE has been a party. There is nothing about this topic that would require CEHE to provide personally identifiable information. Although CEHE expresses concern that the CID would require it to violate FERPA, its petition provides no explanation as to how this would actually occur.

Accordingly, CEHE has failed to show that complying with the CID would impose any undue burden on it, or require it to violate its obligations under FERPA.

II. Relevance

CEHE makes two arguments that attack the relevance of the information sought by the CID. First, CEHE speculates that the Bureau has served it with the CID so as to identify violations of either the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* (FDCPA), the Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq.* (TILA), the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq.* (ECOA), or the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.* (FCRA). Then, CEHE contends that the CID seeks information that is outside the statutes of limitations that apply to those four statutes. Pet. at 11-12. CEHE's second argument regarding relevance relates to a law enforcement action that the State of Colorado brought against it. Pet. at 12-13, citing *Colorado v. Ctr. for Excellence in Higher Educ., Inc.*, No. 2014-cv-34530 (Dist. Ct. of Denver City and Cty., filed Dec. 1, 2014). In that case, Colorado alleged that CEHE had violated the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101, *et seq.*, and the Colorado Uniform Consumer Credit Code, Colo. Rev. Stat. §§ 5-1-101, *et seq.* A bench trial was held in this case in October and November 2017, but the court has yet to reach its decision. CEHE argues, however, that the Bureau's CID duplicates issues investigated by Colorado, and that once the court reaches a decision, that decision will have a preclusive effect on any action that the Bureau might bring. CEHE argues that this justifies either delaying the Bureau's CID or narrowing its scope. Pet. 12-13.

"'[T]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one.'" *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 947 (D.C. Cir. 1994), quoting *FTC v. Invention Submission*, 965 F.2d 1086, 1090 (D.C. Cir. 1992). The test is whether the information requested is "not plainly incompetent or irrelevant to any lawful purpose of the agency." *Invention Submission*, 965 F.2d at 1089 (quotation marks omitted). "So long as the material the [agency] seeks is relevant to the investigation, the boundary of which may be defined quite generally ... the district court must enforce the agency's demand." *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1316 (D.C. Cir. 2011) (emphasis in original, internal quotation marks omitted). Further, "[t]he relevance of the material sought by the [agency] must be measured against the scope and purpose of the [agency's] investigation, as set forth in the [agency's] resolution." *FTC v. Texaco*, 555 F.2d at 874. Thus, "in light of the broad deference we afford the investigating agency, it is essentially the respondent's burden to show that the information is irrelevant." *Invention Submission*, 965 F.2d at 1090.

The first of CEHE's two arguments is based on a misreading of the CID's Notification of Purpose. The Notification explains that the Bureau is investigating whether CEHE has committed unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531, 5536, in connection with offering or extending credit, or providing financial-advisory services to students. The CFPA's statute of limitations provides that "no action may be brought ... more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). So it is irrelevant that the Bureau might be investigating conduct that falls outside the statutes of limitations for the FDCPA, TILA, ECOA, and FCRA. In any event, a CID is not limited merely to information that is actionable. Instead, what counts is whether the information is relevant to conduct for which liability can be lawfully imposed. Even assuming that the CID does seek

information regarding conduct outside the CFPA's statute of limitations,[1] such information may be essential to the Bureau's ability to develop a complete understanding of CEHE's practices and operations. CEHE contends that, because it has made changes to its loan program since 2012, facts regarding previous versions of its program do not relate to its current practices. Pet. at 12. However, it is well settled that that "courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage ...." *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001), citing *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 216 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *United States v. Powell*, 379 U.S. 48, 57-58 (1964). Thus, this argument fails.

CEHE's second argument is highly speculative. It speculates that *Colorado v. Center for Excellence* will result in a final judgment on the merits, that the Bureau will bring a law enforcement action against CEHE, that in that action, CEHE will be able to establish that the Bureau and the Colorado Attorney General are in privity, and that every cause of action the Bureau brings (necessarily under federal law) will be the same as a cause of action brought by Colorado under Colorado state law. *See Smalls v. United States*, 471 F.3d 186, 192 (D.C Cir. 2006) (setting forth the elements of claim preclusion). However, "[a]t the pre-complaint stage, the court is not free to speculate as to possible charges in a future complaint, and then determine the relevance of the subpoena requests on that basis."[2] *FTC v. Church & Dwight Co.*, 747 F. Supp. 2d 3, 9 (D.D.C. 2010), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011). I reject CEHE's claim-preclusion argument because it is based upon multiple speculations, any one of which undermines the argument.

III. Improper Purpose

CEHE's final argument is that the Bureau's true purpose in issuing the CID is not to investigate a possible law violation, but to "harass and humiliate." Pet. at 14. According to CEHE, "upon information and belief," it contends that the Bureau and the office of the Colorado Attorney General have had extensive communications regarding CEHE, and Colorado disclosed "sealed court documents" to the Bureau.[3] CEHE contends that this "strongly suggests that the Bureau and [the Colorado Attorney General] are collaborating to target CEHE." Pet. at 14. In particular, CEHE argues that Colorado's "decision to violate the court's order by providing information to the Bureau raises substantial questions about the Bureau's role in that transaction

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[1] Since the CFPA's statute of limitations begins to run on the date of discovery of a violation, it is not possible during an investigation to make blanket statements as to whether particular conduct falls outside the limitations period.

[2] CEHE also ignores that, even if Colorado prevails in its enforcement action, it could not obtain relief for consumers nationwide.

[3] In its Petition, CEHE notes that the court in *Colorado v. Center for Excellence in Higher Education* required Colorado to file logs of its communications with the Bureau. Those logs were filed by May 31, 2019, ten days after CEHE filed its Petition. On June 17, 2019, CEHE submitted a Supplement to its Petition, and it attached the logs of those communications as exhibits to its Supplement.

and propriety of the concurrently issued CID." *Id.* CEHE also notes that, although the Bureau's counsel represented that the Bureau had received complaints regarding CEHE, there are no such complaints on the Bureau's online complaint database.

The Bureau is entitled to a presumption of good faith in the conduct of its investigations. *United States v. Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979). Because CEHE is challenging that presumption, it carries a heavy burden if it wants to show that the CID was issued for an improper purpose. It must "assert non-frivolous allegations and submit meaningful evidence sufficient to make the allegation factually credible." *Taggart v. Department of Justice*, No. 16-cv-4040, 2017 WL 319062, *11 (E.D. Pa. Jan. 20, 2017) (cleaned up).

CEHE has failed to meet its heavy burden. That burden is not met where the evidence is supported by only "information and belief." In fact, CEHE's suggestion of improper purpose appears to have no basis whatsoever. Both the Bureau and the states have a role with respect to consumer protection. So it is appropriate for the Bureau to contact state law enforcement authorities and to obtain information from those authorities relevant to the Bureau's investigation.[4] The fact that Colorado may have released documents to the Bureau that were subject to a protective order in state court litigation hardly establishes that the Bureau acted in bad faith. And, as soon as the Bureau learned of the improper release, it destroyed those documents. Finally, the mere fact that there are no complaints regarding CEHE listed on the Bureau's website hardly demonstrates bad faith, because not all complaints received by the Bureau are listed on the website. In any event, there is no merit to CEHE's suggestion that the Bureau must have some specific quantity of evidence of a violation before it may issue a CID. *See United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (agency may investigate because it wants assurance that the law is not being violated). Thus, I conclude that the Bureau has an appropriate purpose for this investigation, and CEHE's argument regarding improper purpose is meritless.

CONCLUSION

For the foregoing reasons, I deny CEHE's Petition. CEHE is directed to comply with the CID dated April 12, 2019, as modified by the letter of May 1, and provide oral testimony at a time and location to be specified by Enforcement staff, or at another mutually agreeable time and location arranged with Enforcement staff.

August 18, 2019

Kathleen L. Kraninger, Director

[4] There is nothing in the communications logs, which CEHE attached as exhibits to its Supplement, indicating any inappropriate purpose.